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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

8 Carlos Yanez Peyron,

9 Petitioner,

10 vs.

11 Charles L. Ryan, et al.,

12 Respondents.

CV 15-0414-TUC-JGZ (JR)

**REPORT AND
RECOMMENDATION**

15 Pending before the Court is Carlos Yanez Peyron's Amended Petition for Writ
16 of Habeas Corpus (Doc. 10) filed pursuant to 28 U.S.C. § 2254. In accordance with
17 the Rules of Practice of the United States District Court for the District of Arizona
18 and 28 U.S.C. § 636(b)(1), this matter was referred to the Magistrate Judge for report
19 and recommendation. As explained below, the Magistrate Judge recommends that
20 the District Court, after an independent review of the record, dismiss the Petition
21 with prejudice.

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1 **I. Factual and Procedural Background**

2 In its Memorandum Decision affirming Peyron's conviction and sentence, the
 3 Arizona Court of Appeals summarized the factual background as follows:¹

4 In May 2010, A.M. and C.M. were working at the M & M Customs
 5 shop when Carlos Peyron and three other men entered. One placed a
 6 gun at C.M.'s back and told him to hand over the stereo equipment and
 7 money. C.M. pushed A.M. into the shop's office and A.M. slammed
 8 the office door closed. A.M. retrieved his shotgun from the office, re-
 9 entered the store, and fired a round, which distracted the men and
 10 allowed C.M. to get his own weapon from his toolbox. One of the four
 11 men ran out the back door, then turned around and fired two shots at
 12 C.M., who fired back two times. C.M. returned to the store to find
 13 A.M. holding Peyron and the other two men at gunpoint.

14 Police arrived at the scene almost immediately in response to a 9–1–1
 15 call. When the police arrived, they found one deceased person behind
 16 the store and three men being held at gunpoint inside. Peyron had a
 17 head injury, which he attributed to being pistol whipped. The police
 18 brought Peyron to the hospital for treatment, and after he was released,
 19 brought him to the police station for interrogation.

20 State v. Peyron, 2013 WL 1093055 (Ariz. App. March 14, 2013); Ex. E (copy of
 21 decision).²

22 After a jury trial, Peyron was convicted of first-degree felony murder, and two
 23 counts each of attempted armed robbery, attempted aggravated robbery, and
 24 kidnapping. Ex. E, p. 1; Ex. A, pp. 1-2 (Indictment). The trial court sentenced

19 ¹ The factual summary of the Arizona Court of Appeals is accorded a presumption of
 20 correctness. 28 U.S.C. § 2254(e)(1); *Moses v. Payne*, 555 F.3d 742, 746 n. 1 (9th Cir.
 21 2009) (citing *Hernandez v. Small*, 282 F.3d 1132, 1135 n. 1 (9th Cir. 2002)).

22 ² Unless otherwise indicated, all exhibit references are to the exhibits attached to the
 23 Respondents' Answer to Amended Petition for Writ of Habeas Corpus (Doc. 13).

1 Peyron to a term of life with the possibility of parole after 25 years on the felony
2 murder count, with the sentences on the remaining counts to be served concurrently
3 to the term imposed for the felony murder conviction. Ex. A, pp. 3-7 (sentencing
4 Minute Entry).

5 On direct appeal, Peyron raised four claims, alleging that (1) the trial court
6 abused its discretion by denying his motion to suppress his statements as involuntary;
7 (2) in violation of his due process and equal protection, the Pima County Attorney
8 arbitrarily refused to extend a plea offer; (3) the trial court erred by failing to dismiss
9 the homicide count because it was based on hearsay testimony that was admitted in
10 violation of the Confrontation Clause, and (4) the trial court erred by improperly
11 instructing the jury on reasonable doubt and thereby relieving the state of its
12 constitutional burden of proof. Ex. B., pp. ii-iii, Ex. E, pp. 1-2. By Memorandum
13 Decision filed on March 14, 2013, the Arizona Court of Appeals affirmed Peyron's
14 convictions and sentences. Ex. E, p. 13. Peyron did not seek review of the decision
15 by the Arizona Supreme Court. Exs. F, G.

16 On November 21, 2013, Peyron subsequently filed a PCR notice pursuant to
17 Rule 32, Ariz. R. Crim. P. Ex. H. However, appointed counsel subsequently filed a
18 "Notice of No Colorable Claims" and requested an extension of the filing deadlines
19 to allow Peyron to file a pro se PCR petition. Ex. J. The extension was granted, Ex.
20 K, but Peyron did not file a pro se petition and, by order dated January 7, 2015, the
21 trial court summarily denied relief. Ex. L.

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1 Petitioner commenced this action with the filing of his original petition on
2 September 11, 2015. (Doc. 1). He subsequently filed the now pending Amended
3 Petition on February 4, 2016. (Doc. 8). Peyron raises four claims in the Amended
4 Petition. He claims (1) ineffective assistance of PCR counsel, (2) that he was
5 improperly convicted of felony murder because “the murder happened after [an]
6 attempt at any felony was over,” (3) that his trial counsel was ineffective in arguing
7 to suppress his statements to police, and (4) that the prosecutor admitted that the
8 victims’ testimony was inconsistent. *Amended Petition*, pp. 6-9.

9 In their Limited Answer, Respondents address only two claims, Grounds Two
10 and Three of the Amended Petition. In relation to those two claims, Respondents
11 contend that the claims were not exhausted, are procedurally defaulted, and therefore
12 must be dismissed. As discussed below, the Court finds that Peyron not only failed
13 to exhaust Grounds Two and Three, but also Grounds One and Four. He has not
14 established that any of the claims are properly before the Court and it is
15 recommended that the Amended Petition be dismissed.

16 **II. Discussion**

17 The writ of habeas corpus provides relief to persons in custody pursuant to the
18 judgment of a state court in violation of the Constitution, laws, or treaties of the
19 United States. 28 U.S.C. §§ 2241(c)(3), 2254(a). Petitions for habeas corpus relief
20 are governed by the Anti-terrorism and Effective Death Penalty Act of 1996
21 (“AEDPA”). 28 U.S.C. § 2244.

22

1 **A. Failure to Allege Constitutional Violations**

2 Under Rule 2(c) of the Rules Governing Section 2254 Cases, a § 2254 petition
3 must state all grounds for relief that may be available to the petitioner, the particular
4 federal right allegedly violated, the facts supporting each ground, and the relief
5 requested. In this case, Peyron has failed to expressly allege the constitutional right
6 allegedly violated in any of his claims for relief. The allegations offered in support
7 of Grounds One and Three can generously be construed as alleging ineffective
8 assistance of trial counsel in violation of the Sixth Amendment. However, in Ground
9 Two, Peyron alleges that the victims and witnesses testified that the killing occurred
10 after the robbery attempt was over and that the felony murder rule should not apply
11 to him. In Ground Four, Peyron asserts the victims' testimony was inconsistent. In
12 neither ground does he allege the violation of a federal constitutional right, such as
13 the violation of his federal due process rights. *See Gutierrez v. Griggs*, 695 F.2d
14 1195, (9th Cir. 1983) (challenging the correctness of a state evidentiary ruling does
15 not allege a violation of a federal constitutional right). Because no "clearly
16 established federal law" has been articulated, Peyron is not entitled to habeas relief
17 on Grounds Two and Four. 28 U.S.C. § 2254(d). Moreover, as discussed below, all
18 four of Peyron's claims are unexhausted and procedurally defaulted.

19 **B. Exhaustion and Procedural Default**

20 **1. Legal Standards**

21 Ordinarily, a state prisoner must exhaust his available state remedies before a
22 federal court may consider the merits of his habeas corpus petition. *See* 28 U.S.C. §

1 2254(b)(1)(A); *Nino v. Galaza*, 183 F.3d 1003, 1004 (9th Cir.1999). “[A] petitioner
2 fairly and fully presents a claim to the state court for purposes of satisfying the
3 exhaustion requirement if he presents the claim: (1) to the proper forum, (2) through
4 the proper vehicle, and (3) by providing the proper factual and legal basis for the
5 claim.” *Insyxiengmay v. Morgan*, 403 F.3d 657, 668 (9th Cir. 2005) (citations
6 omitted).

7 Exhaustion requires that a habeas petitioner present the substance of his
8 claims to the state courts in order to give them a “fair opportunity to act” upon these
9 claims. *See O’Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999). “To exhaust one’s
10 state court remedies in Arizona, a petitioner must first raise the claim in a direct
11 appeal or collaterally attack his conviction in a petition for post-conviction relief
12 pursuant to Rule 32,” *Roettgen v. Copeland*, 33 F.3d 36, 38 (9th Cir. 1994), and then
13 present his claims to the Arizona Court of Appeals. *See Swoopes v. Sublett*, 196 F.3d
14 1008, 1010 (9th Cir. 1999).

15 Additionally, a state prisoner must not only present the claims to the proper
16 court, but must also present them fairly. A claim has been “fairly presented” if the
17 petitioner has described the operative facts and federal legal theories on which the
18 claim is based. *Picard v. Connor*, 404 U.S. 270, 277-78 (1971); *Rice v. Wood*, 44
19 F.3d 1396, 1403 (9th Cir. 1995). “Our rule is that a state prisoner has not ‘fairly
20 presented’ (and thus exhausted) his federal claims in state court unless he specifically
21 indicated to that court that those claims were based on federal law.” *Lyons v.*
22 *Crawford*, 232 F.3d 666, 668 (9th Cir. 2000), amended on other grounds, 247 F.3d

1 904 (9th Cir. 2001). A petitioner must alert the state court to the specific federal
2 constitutional guaranty upon which his claims are based, *Tamalini v. Stewart*, 249
3 F.3d 895, 898 (9th Cir. 2001), however, general appeals in state court to broad
4 constitutional principles, such as due process, equal protection, and the right to a fair
5 trial, are insufficient to establish fair presentation of a federal constitutional claim.
6 *Lyons*, 232 F.3d at 669. Moreover, it is not enough that a petitioner presented to the
7 state court all the facts necessary to support an inadequately identified federal claim
8 or that a “somewhat similar” state law claim was raised. *Baldwin v. Reese*, 541 U.S.
9 27, 28 (2004); *Shumway v. Payne*, 223 F.3d 982, 988 (9th Cir. 2000) (mere similarity
10 between a claim of state and federal error insufficient to establish exhaustion).
11 “Exhaustion demands more than drive-by citation, detached from any articulation of
12 an underlying federal legal theory.” *Castillo v. McFadden*, 399 F.3d 993, 1003 (9th
13 Cir. 2005).

14 In Arizona, claims not previously presented to the state courts on either direct
15 appeal or collateral review are generally barred from federal review because any
16 attempt to return to state court to present them would be futile unless the claims fit
17 into a narrow range of exceptions. See Ariz. R. Crim. P. 32.1(d)-(h), 32.2(a)
18 (precluding claims not raised on direct appeal or in prior post-conviction relief
19 petitions), 32.4(a) (time bar), 32.9(c) (petition for review must be filed within thirty
20 days of trial court’s decision). Because these rules have been found to be
21 consistently and regularly followed, and because they are independent of federal law,
22 either their specific application to a claim by an Arizona court, or their operation to

1 preclude a return to state court to exhaust a claim, will procedurally bar subsequent
2 review of the merits of such a claim by a federal habeas court. *Stewart v. Smith*, 536
3 U.S. 856, 860 (2002); *Ortiz v. Stewart*, 149 F.3d 923, 931-32 (9th Cir. 1998) (Rule
4 32, Ariz.R.Crim.P. is strictly followed); *State v. Mata*, 916 P.2d 1035, 1050-52 (Ariz.
5 1996) (waiver and preclusion rules strictly applied in postconviction proceedings).

6 A federal court may not consider the merits of an unexhausted and
7 procedurally defaulted claim unless the petitioner can demonstrate cause for his
8 noncompliance and actual prejudice, or establish that a miscarriage of justice would
9 result from the lack of review. See *Schlup v. Delo*, 513 U.S. 298, 321 (1995). To
10 establish cause, a petitioner must point to some objective factor external to the
11 defense impeded his efforts to comply with the state's procedural rules. *Dretke v.*
12 *Haley*, 541 U.S. 386, 393-94 (2004). “[C]ause is an external impediment such as
13 government interference or reasonable unavailability of a claims factual basis.”
14 *Robinson v. Ignacio*, 360 F.3d 1044, 1052 (9th Cir. 2004) (citations omitted).
15 Ignorance of the state's procedural rules or lack of legal training does not constitute
16 legally cognizable “cause” for a petitioner's failure to fairly present a claim. *Hughes*
17 *v. Idaho State Board of Corrections*, 800 F.2d 905, 908-10 (9th Cir. 1986); *Schneider*
18 *v. McDaniel*, 674 F.3d 1144, 1153 (9th Cir. 2012). “Prejudice” is actual harm
19 resulting from the constitutional violation or error. *Magby v. Wawraszek*, 741 F.2d
20 240, 244 (9th Cir. 1984); *Thomas v. Lewis*, 945 F.2d 1119, 1123 (9th Cir. 1996).

21 Alternatively, a federal court may review the merits of a procedurally
22 defaulted claim where a petitioner can establish that a “fundamental miscarriage of

1 justice” would otherwise result. *Schlup v. Delo*, 513 U.S. at 327. A fundamental
2 miscarriage of justice exists when a constitutional violation resulted in the conviction
3 of one who is actually innocent. *Id.*

4 **2. Analysis of Claims**

5 **a. Ground One**

6 In Ground One of the Amended Petition, Peyron alleges that:

7 I had a [PCR] lawyer . . . who filed a no colorable claims on my Rule
8 32 when there was enough evidence that proved otherwise. Fail
assistance of counsel was what took place.

9 *Amended Petition*, p. 6. Peyron then explains that his trial counsel was ineffective by
10 not providing him the police reports of the incident so he therefore could not
11 effectively assist in his defense. *Id.* He complains that he did not receive the
12 requested documentation until much later and that his lawyers’ did not “put forth
13 good faith in [his] case.” *Id.*

14 Peyron does not contest that he failed to exhaust Ground One. When asked
15 in the court-provided form why he did not present the claim to the Arizona Court of
16 Appeals, he responded that “my lawyer during trial failed to provide me with any
17 paperwork concerning my case and this is new evidence.” *Id.*, p. 6. As Peyron
18 recognizes, this claim was not presented to the Arizona Court of Appeals and was not
19 exhausted. *Coleman*, 501 U.S. at 735 n. 1. Respondents contend and Peyron does
20 not contradict, that Peyron is procedurally barred from now raising Ground One in
21 State court. See Ariz.R.Crim.P. 32.2(a)(1) (“A defendant shall be precluded from
22 relief under [Rule 32] based upon any ground . . . [r]aisable on direct appeal . . . or on

1 post-trial motion"); Ariz.R.Crim.P. 32.2(a)(3) ("A defendant shall be precluded
2 from relief under [Rule 32] based upon any ground . . . [t]hat has been waived at trial,
3 on appeal, or in any previous collateral proceeding."); *Beaty v. Stewart*, 303 F.3d
4 975, 987 (9th Cir. 2002). However, Peyron's allegations can charitably be construed
5 as alleging that his default is excused by the fact that his lawyers did not give him the
6 paperwork necessary to support his claims and as alleging ineffective assistance of
7 his PCR counsel in the failure to allege ineffective assistance of trial counsel. As
8 such, the Court will consider whether Peyron has shown "cause" to excuse his
9 procedural default under the "narrow circumstances" described in *Martinez v. Ryan*,
10 132 S. Ct. 1309, 1318 (2012).

11 Under *Martinez*, Peyron bears the burden to show that "the underlying
12 ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that
13 the prisoner must demonstrate that the claim has some merit." *Sexton v. Cozner*, 679
14 F.3d 1150, 1157 (9th Cir. 2012). He has not done so. Although he indicates that his
15 appellate lawyer provided him with the needed documents, he has not identified what
16 information from the police reports or other documents would have been useful to
17 him at trial or explained how that information would have established that his trial
18 counsel was ineffective. It is not the court's role to search the record for evidence
19 that might support Peyron's claim of ineffective assistance of counsel. See
20 *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994) ("We review only issues which
21 are argued specifically and distinctly in a party's opening brief. We will not
22 manufacture arguments for an appellant, and a bare assertion does not preserve a

1 claim”). Because Peyron fails to prove this claim has any potential merit, the
 2 procedural default of this claim is not excused.

3 **b. Ground Two**

4 In Ground Two, Peyron alleges that the victims of the robbery “both admit to
 5 the murder happening after the fact,” and contends that “[f]elony murder should not
 6 apply.” *Amended Petition*, p. 7. He asserts that the police reports establish that one
 7 of the victims chased one of perpetrators from the building and shot him and
 8 rhetorically asks, “Why follow or chase a man with a gun other than to inflict
 9 harm[?]” *Id.* He contends that his trial counsel did not know these facts and that the
 10 police reports and trial transcripts “prove the murder happened after [an] attempt of
 11 any felony was over.” *Id.*

12 Again, Peyron does not contest that he failed to exhaust Ground Two. He
 13 states that he did not present the claim because “my [trial] lawyer . . . stated he would
 14 handle the case & needed no help from myself.” *Id.*, p. 7. He has not countered the
 15 Respondents’ contention that the claim is procedurally barred under Arizona law.
 16 *See Ariz.R.Crim.P. 32.2(a)(1)* (“A defendant shall be precluded from relief under
 17 [Rule 32] based upon any ground . . . [r]aisable on direct appeal . . . or on post-trial
 18 motion”); *Ariz.R.Crim.P. 32.2(a)(3)* (“A defendant shall be precluded from
 19 relief under [Rule 32] based upon any ground . . . [t]hat has been waived at trial, on
 20 appeal, or in any previous collateral proceeding.”); *Beaty*, 303 F.3d at 987. As such,
 21 the merits of the claims need not be addressed unless Peyron establishes cause and
 22 prejudice or that a fundamental miscarriage of justice has occurred.

1 Peyron has not attempted to establish cause for the default and, even if he
2 could, he cannot establish prejudice because this claim is without merit. The
3 Supreme Court has “repeatedly held that a state court’s interpretation of state law . . .
4 binds a federal court sitting in habeas corpus.” *Bradshaw v. Richey*, 546 U.S. 74, 76
5 (2005). To overcome this prohibition, a petitioner must establish that the state
6 court’s interpretation was so arbitrary or capricious as to constitute an independent
7 due process or Eighth Amendment violation. *See Lewis v. Jeffers*, 497 U.S. 764, 780
8 (1990). Without such a showing, the federal court is bound by the state court’s
9 interpretation of its own law, including its felony murder statute. *Hawkins v. Mullin*,
10 291 F.3d 658, 662-63 (10th Cir. 2002); *see also Estelle v. McGuire*, 502 U.S. 62, 68
11 (1991) (federal habeas corpus relief does not lie for errors of state law, and federal
12 courts may not reexamine state court determinations on state law issues).

13 Arizona’s murder statute, A.R.S. § 13-1105 provides, defines felony murder
14 as committing a predicate felony, including robbery and kidnapping, “and, in the
15 course of and in furtherance of the offense or immediate flight from the offense, the
16 person or another person causes the death of any person.” A.R.S. § 13-1105(2).
17 Here, it is undisputed that the decedent ran out the back door of the stereo store and
18 was shot by one of the victims of the robbery and, when the police arrived, they
19 found him dead behind the store. These facts fit squarely within the Arizona felony
20 murder statute and Peyron has identified no authority that suggests, much less
21 establishes, that Arizona has interpreted the statute in an arbitrary or capricious
22 manner. As such, the default of this claim is not excused.

1 **c. Ground Three**

2 In Ground Three of the Amended Petition, Peyron alleges that his trial counsel
3 “argued a motion but had no proof. He also lied to the court.” *Amended Petition*, p.
4 8. Peyron proceeds to explain that his trial counsel filed a motion to suppress his
5 post-arrest statements on the grounds that Peyron had suffered a head injury and
6 concussion during the robbery and should not have been questioned. *Id.* He
7 contends that trial counsel should have produced the results of a CT scan procedure
8 that he underwent after his arrest. *Id.*

9 Although Peyron appealed the trial court’s denial of his motion to suppress on
10 direct appeal, it was never raised as a claim of ineffective assistance of counsel. Ex.
11 E, pp. 3-5. Peyron does not contend otherwise, explaining that “[t]his evidence was
12 not seen” by PCR counsel. *Id.* Thus, the claim was not exhausted. Additionally,
13 Peyron has not countered the Respondents’ contention that the claim is procedurally
14 barred under Arizona law. *See* Ariz.R.Crim.P. 32.2(a)(1) (“A defendant shall be
15 precluded from relief under [Rule 32] based upon any ground . . . [r]aisable on direct
16 appeal . . . or on post-trial motion . . .”); Ariz.R.Crim.P. 32.2(a)(3) (“A defendant
17 shall be precluded from relief under [Rule 32] based upon any ground . . . [t]hat has
18 been waived at trial, on appeal, or in any previous collateral proceeding.”); *Beaty*,
19 303 F.3d at 987. However, like those raised in Ground One, Peyron’s allegations can
20 be construed as alleging that his default is excused by the fact that his PCR counsel
21 was ineffective for failing to allege ineffective assistance of trial counsel. As such,

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1 the Court will consider whether Peyron has shown “cause” to excuse his procedural
2 default under the “narrow circumstances” described in *Martinez*.

3 As noted previously, under *Martinez*, Peyron bears the burden to show that
4 “the underlying ineffective-assistance-of-trial-counsel claim is a substantial one,
5 which is to say that the prisoner must demonstrate that the claim has some merit.”
6 *Sexton*, 679 F.3d at 1157. He has not done so. Under *Strickland v. Washington*, 466
7 U.S. 668 (1984), a meritorious ineffective assistance of counsel claim requires that a
8 petitioner show: (1) deficient performance— that counsel’s representation fell below
9 the objective standard for reasonableness; and (2) prejudice— there is a reasonable
10 probability that, but for counsel’s unprofessional errors, the result of the proceeding
11 would have been different. *Id.* at 687-88. In the Amended Petition, Peyron merely
12 mentions that he had a CT scan and contends that his counsel should have presented
13 it in relation to the motion to suppress his statement to police. However, he does not
14 claim that the information contained in the scan was reasonably likely to change the
15 outcome of his motion to suppress or subsequent trial. *See Bragg v. Galaza*, 242
16 F.3d 1082, 1088 (9th Cir. 2001) (petitioner failed to establish prejudice where he did
17 “nothing more than speculate” that a witness would have provided helpful
18 testimony); *see also Lambert v. Blodgett*, 393 F.3d 943, 982 (9th Cir. 2004) (“Courts
19 have generally rejected claims of ineffective assistance premised on a failure to
20 investigate where the . . . additional evidence was unlikely to change the outcome at
21 trial.”); *Jackson v. Calderon*, 211 F.3d 1148, 1154-55 (9th Cir. 2000) (finding no
22 prejudice from counsel’s alleged failure to investigate when petitioner did not meet

1 his burden to present evidence that investigation would have revealed favorable
2 evidence). Nor could he effectively make such an argument. In addressing this
3 claim on direct appeal, the Arizona Court of Appeals rightly noted that Peyron had
4 offered no evidence to support his contention that he had sustained a “severe
5 concussion.” Ex. E, p. 4. The court also noted that he had been released from the
6 hospital and that during the interrogation showed no outward signs suggesting his
7 will had been overborne. Ex. E, p. 5. These considerations establish that this claim
8 has no potential merit and that Peyron is entitled to no relief under *Martinez* for his
9 procedural default of this claim.

10 **d. Ground Four**

11 In Ground Four, Peyron alleges that the prosecutor admitted that one of the
12 victims, A.M., “says one thing & at trial another.” In support of this claim, Peyron
13 points out that there were minor discrepancies in the victims’ testimony, both saying
14 they pushed the other, and that this testimony was inconsistent with their previous
15 statements. *Amended Petition*, p. 9. Once again, Peyron admits that this claim was
16 not presented to the Arizona Court of Appeals, stating that “none of my lawyer[s]
17 seen these facts.” *Id.* He has not countered the Respondents’ contention that the
18 claim is procedurally barred under Arizona law. *See Ariz.R.Crim.P. 32.2(a)(1)* (“A
19 defendant shall be precluded from relief under [Rule 32] based upon any ground . . .
20 [r]aisable on direct appeal . . . or on post-trial motion”); *Ariz.R.Crim.P.*
21 32.2(a)(3) (“A defendant shall be precluded from relief under [Rule 32] based upon
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1 any ground . . . [t]hat has been waived at trial, on appeal, or in any previous collateral
2 proceeding."); *Beaty*, 303 F.3d at 987.

3 The Court cannot consider the merits of this unexhausted and procedurally
4 defaulted claim unless Peyron can demonstrate cause for his noncompliance and
5 actual prejudice. *See Schlup*, 513 U.S. at 321. Petitioner has attempted to do neither.
6 As a threshold matter, it is unlikely that Peyron could show prejudice based on the
7 admission of evidence under state law because such claims rarely warrant habeas
8 relief. *Estelle*, 502 U.S. at 67. Moreover, the Court cannot discern from the
9 argument what prejudice is alleged to have come from the purported inconsistencies.
10 *See Magby*, 741 F.2d 244 ("prejudice" is actual harm resulting from an alleged
11 constitutional error or violation); *Holley v. Yarborough*, 568 F.3d 1091, 1101 (9th
12 Cir. 2009) (no basis for habeas relief based on admission of evidence unless it
13 renders trial "fundamentally unfair"). Because Peyron has not identified a
14 constitutional violation that resulted in prejudice, and because an error of state law is
15 insufficient to overcome his procedural default, this claim is not properly before the
16 Court and must be dismissed.

17 **III. Recommendation**

18 Based on the foregoing, the Magistrate Judge **RECOMMENDS** that the
19 District Court, after its independent review, **dismiss** Peyron's Amended Petition for
20 Writ of Habeas Corpus (Doc. 10).

21 This Recommendation is not an order that is immediately appealable to the
22 Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1),

1 Federal Rules of Appellate Procedure, should not be filed until entry of the District
2 Court's judgment.

3 However, the parties shall have fourteen (14) days from the date of service of
4 a copy of this recommendation within which to file specific written objections with
5 the District Court. *See* 28 U.S.C. § 636(b)(1) and Rules 72(b), 6(a) and 6(e) of the
6 Federal Rules of Civil Procedure. Thereafter, the parties have fourteen (14) days
7 within which to file a response to the objections. Replies shall not be filed without
8 first obtaining leave to do so from the District Court. If any objections are filed, this
9 action should be designated case number: **CV 15-0414-TUC-JGZ**. Failure to timely
10 file objections to any factual or legal determination of the Magistrate Judge may be
11 considered a waiver of a party's right to *de novo* consideration of the issues. *See*
12 *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir.2003)(*en banc*).

13 || Dated this 10th day of February, 2017.

Jacqueline M. Rateau
Honorable Jacqueline M. Rateau
United States Magistrate Judge

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